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IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1994

EDWARD J. ANDRESS,

PETITIONER,

versus

MARVIN T. RUNYON,
POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDWARD J. ANDRESS, Citizen pro Se
C/O EDWARD L. ANDRESS
3408 HULBERT AVENUE
ERLANGER, KENTUCKY 41018
(606) 727-2032

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the June 14, 1991 Agency action terminating Petitioner's affirmative action (Veterans preference) employment was collaterally reviewable *de novo* pursuant to 42 USC §2000e-16(c)? based on Respondent's failure to take final action on Petitioner's timely filed October 29, 1991 EEO Complaint[s] for discrimination matters related to that Action but, never litigated within the scope of 5 USC§7702(a)(2) by the U.S. Merit Systems Protection Board at the August 23, 1991 Hearing, or determined in the initial decision.. Andress v. U.S. Postal Service, CH0752910619 (November 5, 1991).

2. Whether the June 14, 1991 Agency action was the product of a conspiracy in fraud by Respondent's employees, including officials, purposed to interfere with Petitioner's fundamental and statutory civil rights; violative of 18 USC§1001; 29 USC § 794(a); 42 USC § 2000e - et seq; and guaranteed by the First; Fifth; and Eighth Amendments to the Constitution? who acted with class (handicap, race) based discriminatorily animus in the disguise of colorable authority to arbitrarily and discriminatorily inflict the maximum Agency penalty on Petitioner without cause for the ulterior

purpose of eliminating his legitimate EEO opposition activity.

3. Whether the September 30, 1991 state criminal prosecution of Petitioner (Ohio v. Andress, 91-CRB-18768) in Hamilton County municipal court was included in the June 14, 1991 conspiracy and violative of 42 USC § 1985(3); the Sixth; Thirteenth and Fourteenth Amendments to the Constitution? in furtherance of the conspirator's unlawful object, by expropriating Petitioner's immunity from false prosecution and the only remaining presumption of innocence to the specious accusation of assault upon which the entire Agency action rested.

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Edward J. Andress - Citizen pro Se

   Petitioner / Appellant / Plaintiff

2. Marvin T. Runyan - Postmaster General of the United States

   Respondent / Appellee / Defendant

TABLE OF CONTENTS

PAGE

Questions Presented For Review . . . i
Parties To The Proceedings Below . . . ii
Table Of Contents iii
Table Of Appendices iv
Table Of Authorities v
Cases v
Constitutional Authority vii
Statutory Authority vii
Rules viii
Reports Of Opinions Delivered Below . . viii
Grounds For The Writ Of Certiorari . . . 1
Opinions Below 3
Jurisdiction Of The Supreme Court . 3
Constitutional Provisions 4
Statutory Provisions 4
Statement Of The Case 5
A. Nature Of The Case . . . 5
B. Statement Of Facts 6
C. Course Of The Proceedings . 10
Reasons For Granting Certiorari 16
A. Introduction 16
B. Specific Violation[s] . . . 19
[1] 21
[2] 21
[3] 25
[4] 27
Conclusion 28
Affidavit of Verification & Certificate of Service & Appendices

TABLE OF APPENDICES

A. The final Opinion and Order [94-3474] of the court of appeals for the Sixth Circuit entered on June 2, 1995.

B. The initial Opinion and Order of the court of appeals for the Sixth Circuit entered on April 12, 1995.

C. The final Opinion and Order [C-1-93-207] of the federal district court for the Southern District of Ohio, entered on October 18, 1994.

D. The initial Opinion and Order of the federal district court for the Southern District of Ohio, entered on March 29, 1994.

E. The Magistrate's Report and Recommendation entered on February 3, 1994.

F. The final Order of the Merit Systems Protection Board entered on April 22, 1992.

G. The initial decision of the MSPB entered on November 5, 1991.

H. The Statutory Provisions reproduced.

I. The October 29, 1991 EEO Complaint[s]-proof of service on the Respondent's Agent.

TABLE OF AUTHORITIES

CASES — PAGE

Cooper v. Schlesinger
111 U.S. 148 (1884)
4 S. Ct. 360
28 L. Ed. 382 23

Abbott Laboratories v. Gardner
387 U.S. 136 (1967)
87 S. Ct. 1507
18 L.Ed 2d 681 30

Griffen v. Breckenridge
403 U.S. 88 (1971)
91 S. Ct. 1790
29 L.Ed.2d 338 27

Furman v. Georgia
408 U.S. 238 (1972)
92 S.Ct. 2726
33 L. Ed. 2d 346 25

Arnett v. Kennedy
416 U.S. 134 (1974)
94 S.Ct. 1633
40 L. Ed. 2d 15 25

Chandler v. Roudebush
425 U.S. 840 (1976)
96 S. Ct. 1949
48 L. Ed. 2d 416 16,18,29

McDonald v. Santa Fe Trail Transportation Co.
427 U.S. 273 (1976)
96 S. Ct. 2574
49 L. Ed. 2d 493 21,26

CASES PAGE

Personnel Administrator of Massachusetts v. Feeney
442 U.S. 256 (1979)
99 S. Ct. 2282
60 L. Ed. 2d 870 30

Irvin v. Dep't. of Veterans Affairs
498 U.S. 89 (1990)
111 S. Ct. 453
112 L. Ed. 2d 435 18

United States v. Bedore
455 F. 2d 1109 (9th Cir. 1972) . . 22

United States v. Bostic
480 F, 2d 965 (6th Cir. 1973) . . . 24

United States v. Goldfine
538 F. 2d 815 (9th Cir. 1976) . . . 22

United States v. Estus
544 F. 2d 934 (8th Cir. 1976) . . . 22

United States v. Evans
559 F. 2d 244 (5th Cir. 1977) . . . 22

Rosenfeld v. Department of the Army
769 F. 2d 237
(4th Cir. 1985) 15,16,18,19,29

Haithcock v. Frank
958 F. 2d 671 (6th Cir. 1992) . . . 21

United States v. Myers
131 F. Supp 525 (D.C. Cal 1955) . 22

CASES PAGE

Johnson v. Hardnett
Ohio App 405 N.E. 2d 324 (1978) . 20

Ohio v. Andress
91 CRB 18768
Hamilton Cty. Mun. Ct. (1991) 11,26,27

CONSTITUTIONAL AUTHORITY

PAGE

U.S.C.A. Constitution, Article III
Section 1 3
Section 2 3
U.S.C.A. Constitution, Amendment 1. 4,24,25
U.S.C.A. Constitution, Amendment 5. . 4,25
U.S.C.A. Constitution, Amendment 6. 4,26,27
U.S.C.A. Constitution, Amendment 8. . 4,25
U.S.C.A. Constitution, Amendment 13. 4,26,27
U.S.C.A. Constitution, Amendment 14. 4,26.27

STATUTORY AUTHORITY

(APPENDIX H: # 1 - 13, in order)

PAGE

5 U.S.C. § 7701(a)(1). 4,10
5 U.S.C. § 7701(a)(2). 4,17
5 U.S.C. § 7701(b)(2). . 2,3,5,13,14,17,28
18 U.S.C. § 1001. . . . 5,22,23,25

PAGE

18 U.S.C. § 1254(1). 3,5
29 U.S.C. § 794(a). . . . 5,13,21,29
42 U.S.C. § 1983(3). 5,27
42 U.S.C. § 2000e-2(a). . 5,13,14,21,24,29
42 U.S.C. § 2000e-3(a). . 5,13,14,21,24,29
42 U.S.C. § 2000e-11. . 5,13,14,21,29,30
42 U.S.C. § 2000e-16(c). 2,5,13,14,18,19,21,29
Ohio R.C. § 2903.13 . . . 5,19,20
29 C.F.R. § 1613.641(a)(2). 5,18

RULES PAGE

S. Ct. R. 10.1 3
Fed. R. App. P. 35 1,15
6th Cir. R. 14 1,15
Fed. R. Civ. P. 52(a) 2,14,28
Fed. R. Civ. P. 55 13
Fed. R. Civ. P. 56 2,13,28
Fed. R. Civ. P. 60(b) 2,14,28

REPORTS OF OPINIONS DELIVERED BELOW

PAGE

Celotex Corp. v. Catrett
477 U.S. 317, 323 (1986)
106 S. Ct. 2548
91 L. Ed. 2d 265 29

PAGE

Hilliard v. United States Postal Service
814 F.2d 325, 326-27 (6th Cir. 1987) *-n/a

Harris v. Callwood
844 F. 2d 1254, 1255-56
(6th Cir. 1988) 28

EEOC v. University of Detroit
904 F.2d 331, 334 (6th Cir. 1990) . n/a

United States v. Boch Oldsmobile Inc.
909 F.2d 657, 661 (1st Cir. 1990) . 29

Dean v. Veterans Admin. Regional Office
943 F.2d 667, 669-70 (6th Cir. 1991) . n/a

Glarner v. United States Dep't. of Veterans Affairs
30 F.3d 697, 701 (6th Cir. 1994) . . n/a

* - not applicable to the EEO Complaint[s]

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EDWARD J. ANDRESS,

PETITIONER,

VS.

MARVIN T. RUNYON,
POSTMASTER GENERAL, USPS,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

GROUNDS:

Petitioner, Edward J. Andress, respectfully petitions the Supreme Court of the United States of America that a writ of certiorari be issued to review the final Order of the court of appeals in Andress v. Runyon, 94-3474 (6th Cir. June 2, 1995). That Order denied Petitioner's April 21, 1995 Fed. R. App. P. 35 and 6th Cir. R. 14 Suggestion For Rehearing En

Banc, appealing the court of appeals' April 12, 1995 Opinion and Order affirming the district court's final Opinion and Order in Andress v. Runyon, C-1-93-207 (S.D. Ohio October 18, 1994). The final district court Order denied Petitioner's April 5, 1994 Fed. R. Civ. P. 60(b) Motion To Vacate Void Judgment entered on March 29, 1994.

Specifically, the court of appeals and the district court abused their discretion by affirming a Fed. R. Civ. 56 Summary Judgment in favor of Respondent on Petitioner's October 29, 1991 EEO Complaint[s] based solely on 5 USC § 7703 (b) (2), without providing a conclusion of law pursuant to Fed. R. Civ. P. 52 (a), as to why the EEO Complaint[s] referenced in the March 31, 1993 Complaint (C-1-93-207) Caption, was not actionable in the district court pursuant to 42 USC § 2000e-16(c), one hundred eighty (180) days after timely and Certified presentation to Respondent's designated EEO processing agent. (Appendix I.) It was collaterally capable of invalidating the June 14, 1991 Agency action, terminating Petitioner's affirmative action employment. Prior to their rulings, both lower courts were informed of precedent legal authority supporting the independent actionability of the EEO Complaint[s], notwithstanding the prior MSPB Appeal. Andress v. U.S. Postal Service,

CH0752910619 (April 22, 1992). (Appendix F.) The EEO Complaint[s] was not subject to the MSPB appellate jurisdiction of 5 USC § 7703 (b) (2). The EEO Complaint[s] has never been disputed or denied by the Respondent or his authorized representative.

OPINIONS BELOW

The Opinions below are listed and located in the Table Of Appendices. (ante, at p. iv.)

JURISDICTION OF THE SUPREME COURT

The initial Opinion and Order of the court of appeals for the Sixth Circuit in Case No. 94-3474 was entered on April 12, 1995, and the final Order on June 2, 1995.

The Supreme Court of the United States of America, has appellate jurisdiction to review the judgments of the courts below and the October 29, 1991 EEO Complaint[s] for equitable relief, presented to Respondent, whom has never denied their validity, pursuant to:

1) The Constitution, Article III, Sections 1 and 2;
2) 28 USC §1254(1);
3) S. Ct. R. 10.1(a) and (c).

CONSTITUTIONAL PROVISIONS

ARTICLE III, - 1787

Section 1. The judicial Power of the United States, shall be vested in one supreme court, . . .

Section 2. The judicial Power shall extend to all Cases in Law and Equity, arising under the Constitution, the Laws of the United States, . . .

BILL OF RIGHTS, - 1791

ARTICLE I.

. . . freedom of speech . . . and to petition the Government for a redress of grievances.

ARTICLE V. No person shall be . . . deprived of life, liberty, or property, without due process at law;

ARTICLE VI. In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed,

ARTICLE VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

OTHER AMENDMENTS

ARTICLE XIII, - 1865

Section 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV, -1868

Section 1.

. . . the equal protection of the laws.

STATUTORY PROVISIONS

APPENDIX H

1. 5 USC § 7701. Appellate procedure
2. 5 USC § 7702. Actions involving discrimination

3. 5 USC § 7703. Judicial review of decisions of the MSPB
4. 18 USC § 1001. Statements or entries generally
5. 28 USC § 1254. Court of appeals; Certiorari; certified questions
6. 29 USC § 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations
7. 42 USC § 1985. Conspiracy to interfere with civil rights
8. 42 USC § 2000e-2. Unlawful employment practices
9. 42 USC § 2000e-3. Other unlawful employment practices
10. 42 USC § 2000e-11. Veterans preference
11. 42 USC § 2000e-16. Nondiscrimination in federal government employment
12. Ohio R. C. § 2903.13. Assault
13. 29 CFR. § 1613.641. Statutory right

STATEMENT OF THE CASE

A. Nature Of The Case

This case involves the second termination of Petitioner's Veterans preference employment with the USPS ("Agency") and a deliberate continuing violation of anti-discrimination (handicap, reprisal, race) laws, evidenced in the first termination by the same deciding Agency official. Andress v. Frank, C-1-89-511 (S.D. Ohio December 12, 1990).

It was designed to terminate Petitioner's employment. The *modus operandi* was:

1) handicap harassment prompting;
2) EEO activity;
3) subsequent progressive disciplinary action;
4) leading to termination of employment.

This same institutional Respondent damaged Petitioner, Twenty Thousand Dollars ($20,000) by the first employment termination in 1989.

B. Statement Of The Facts

Petitioner is a caucasian disabled Viet Nam Veteran, hired under affirmative action by the USPS on or about April 16, 1983; last working May 14, 1991, as a mailhandler at the 'Annex', 1623 Dalton Street, Cincinnati, Ohio. He informed the Agency through his employment application of a stress disorder - Post Traumatic Stress Disorder (PTSD) - as a result of gun shot wounds from hostile forces fire in the Republic of South Viet Nam, May 9, 1970.

Beginning in 1984, the supervisors in charge of Petitioner began using the color of their authority to make Petitioner's work place a hostile environment. In June 1986, Petitioner attempted to file his first EEO Complaint for handicap harassment, but the attempt was ignored by EEO Agent Darrell Brown. The EEO Office delayed processing the Complaint for almost one (1) year until the suggestion of court action got their attention to the matter in May of 1987. During that intervening one (1) year period, four (4) progressive disciplinary

actions were initiated against Petitioner. It was another year before the EEO Office decided on or about April 22, 1988, that there was no discrimination.

That Agency decision was appealed to the EEOC, and heard on October 24, 1988. The EEOC found Petitioner to be a qualified handicapped employee. Andress v. Frank, 220-88-5257X (May 12, 1989). On or about December 26, 1988, it was proposed that Petitioner should be removed from employment. On February 14, 1989, Supervisor William Thompson recorded his first termination of Petitioner's employment without cause. The U.S. Merit Systems Protection Board ("MSPB") reversed that administrative action because the Agency's charge could not be supported. Andress v. U.S. Postal Service, CH07528910302 (July 7, 1989). The EEOC Decision and the discrimination issues arising from the termination were appealed to federal district court. Andress v. Frank, C-1-89-511 (S.D. Ohio 1990). The institutional Defendant agreed to pay for settlement of the discrimination issues on December 12, 1990.

On January 2, 1991, Supervisor Leonard Adams recorded his first attempt to singularly remove Petitioner from employment without cause for his participation in an insubordinate protest *en*

masse (75 + employees) New Year's Eve 1990. Henceforth Adams began to harass Petitioner including a challenge to: "go outside"; and settle an interpersonal dispute at or about 3:15 P.M. on April 29, 1991. At that time, Petitioner requested to see an EEO Counselor. On May 3, 1991, Petitioner filed an EEO Complaint for indefensible handicap harrassment at the EEO Office. Adams initiated three (3) separate progressive disciplinary actions between April 29, 1991, and May 14, 1991.

On May 14, 1991, at or about 11:30 P.M., Petitioner was involved in a workplace fight with a black employee, Charles Worsham, on the southwest dock of 'A' Building. Worsham backed into Petitioner with a 7500 lb. forklift, without looking where he was going. Worsham had two (2) reckless driving encounters with Petitioner at 10:30 P.M. and 10:45 P.M., corroborated under oath by employees John Bradford and Dennis Gurley, respectively. Worsham cursed Petitioner at 10:45 P.M., corroborated by Gurley, when informed pedestrians have right of way. Worsham's own sworn testimony about the 11:30 P.M. incident was: "I'm not certain I didn't hit him"; with the forklift. Words were exchanged. Worsham came off the forklift to physically confront Petitioner. Blows were exchanged by the belligerents. Three (3) other

employees were in the vicinity of the fightscene: Dennis Gurley; David Grosser; and William Powell. Their sworn testimony about what they actually saw or rather did not see at 11:30 P.M. was:

Gurley:	"my view [of Petitioner] was blocked at the time";
Grosser:	"I presume he did. I didn't actually see the" (kick);
Powell:	"I heard a sound. I didn't actually see the punch."

At or about 11:31 P.M., the fight was over and Worsham threatened retaliation: "I'll get you"; corroborated under oath by Gurley. 1./ As Worsham was being restrained from further attack, Petitioner vacated the situation. At or about 11:43 P.M., Worsham submitted an official Statement to his supervisor accusing Petitioner of assault, without disclosing his hostile contact with Petitioner before the fight. Worsham initiated a criminal complaint with the Cincinnati Police at or about the same time.

On May 15, 1991, at 3:00 P.M. Supervisor Leonard Adams ordered Petitioner to immediately give a written account of the preceding night's event. Petitioner submitted the following statement:

1/. Petitioner submitted this hitherto undisputed evidence to the district court on August 12, 1993, in a Memorandum Of Evidence (at p. 6-7, 10-11) based on his first hand personal knowledge and affidavit of verification.

> "At 11:30 P.M. I was walking out. (05/14/91.) The forklift driver got on his forklift and backed into me. I asked him if he had a problem. He got off the forklift and struck me and I struck him back."

Adams ordered Petitioner to leave the premises and await further notice. On May 24, 1991, Adams mailed Petitioner a Notice Of Proposed Removal, based on Worsham's May 14, 1991 Accusation of assault.

On June 14, 1991, Supervisor William Thompson agreed with Adams' Proposal and mailed his second Notice Of Decision-Removal, to Petitioner within a twenty-eight (28) month period.

C. Course Of The Proceedings

On July 11, 1991, an appeal was filed with the MSPB and heard on August 23, 1991. Witnesses: Adams; Bradford; Grosser; Gurley; Powell; Thompson and Worsham, deposited their sworn testimony under direct and cross examination, pursuant to 5 USC § 7701(a)(1). Andress v. U.S. Postal Service, CH0752910619 (November 5, 1991). (Appendix G.) Petitioners affirmative defenses were:

1) handicap discrimination - mental (PTSD);
2) reprisal discrimination - May 3, EEO Complaint;
3) procedural error -incomplete investigation.

The Agency action was affirmed. Petitioner asked the full Board to review the lack of evidence against him. On April 22, 1992, the Board declined. (Appendix F.) The record closed August 23, 1991.

On September 30, 1991 the criminal complaint initiated May 14, 1991, by Worsham against Petitioner was tried in the Hamilton County municipal court in Cincinnati. Ohio v. Andress, 91-CRB-18768. Race was not considered in the MSPB Appeal or the Trial. Judge Donnellon was the judge and trier of fact:

> THE COURT: "Finding of guilty. Now it's quite obvious to me something is mushrooming this thing to a black and white incident. It's being controlled by the board down in the post office."

On October 29, 1991, Petitioner timely filed EEO Complaint[s] by Certified Mail (P 742 552 303) with Respondent's EEO Agent Darrell Brown, whom personally signed the Mail Receipt. (Appendix I.) 2./ It's elements, to wit:

1) that the May 3, 1991 EEO Complaint (P 290 930 804) was not answered;

2./ The Certified Mail Numbers referenced in the March 31, 1993 Complaint (C-1-93-207) Caption registered the transmittal of EEO Complaint[s] between Petitioner and Respondent's EEO Agent Darrell Brown on May 3, 1991 and October 29, 1991. For the sake of clarity and brevity they are combined on the latter date, referenced herein as the Complaint[s].

2) that there was a 'pattern and practice' of handicap discrimination conducted by Supervisor Adams beginning New Years Eve, 1990 [January 2, 1991], including a challenge to fight on April 29, 1991;

3) that the Agency removal action [June 14, 1991] was so tainted by untrue statements and unethical conduct that it was improperly motivated and retaliation for all past EEO actions [evidencing Andress v. Frank, C-1-89-511 (S.D. Ohio 1990)], damage paid on March 8, 1991;

4) that on September 30, 1991, Judge Donnellon [Ohio v. Andress, 91-CRB-18768] said "it was obvious to him that the board at the post office was making this a black and white issue [sic]". And a claim of race discrimination. William (Bill) Thompson respondent.

The EEO Complaint[s] was filed in the federal district court on May 15, 1992, with the MSPB Appeal. Andress v. U.S. Postal Service, C-1-92-417 (S.D. Ohio March 3, 1993). The jurisdictions of the EEO Complaint[s] and the MSPB Appeal were never mixed at the administrative level. Service of process was not perfected. The case was dismissed for lack of personam jurisdiction. There was no judgment on the merits. That dismissal was upheld by the court of appeals. Andress v. U.S. Postal Service, 93-3391 (6th Cir. October 21, 1993).

On March 31, 1993, the aforementioned EEO Complaint[s] was restyed and refiled in the district court with the MSPB Appeal.

Andress v. Runyon, C-1-93-207, (S.D. Ohio October 18, 1994). The October 29, 1991 EEO Complaint[s] was:

1) clearly displayed in the Caption according to the EEO Complaint[s] certified mail number;
2) invoking subject matter jurisdiction under 29 USC § 794(a) and 42 USC § 2000e-et seq.;
3) further explained in the twelfth (12th) administrative procedure;
4) cited as the sixth (6th) cause of action. (Complaint: at p.1, 2, 3, 5.)

On June 1, 1993, counsel for the Postmaster General motioned for Summary Judgement pursuant to Fed. R. Civ. P. 56 and 5 USC § 7703(b)(2), based on the untimeliness of the MSPB Appeal. Petitioner opposed that Motion on June 11, 1993, and filed a Memorandum on June 25,1993, (at p. 2) calling opposing counsel's attention to the unanswered EEO Complaint[s]. They continued to ignore the EEO Complaint[s]. Petitioner filed a Motion For Summary Judgment by default, pursuant to Fed. R. Civ. P. 55 and Memorandum Of Evidence on August 12, 1993, based on Respondent's refusal to plead to the EEO Complaint[s].

On January 20, 1994, an evidentiary Hearing was held by a Magistrate. Petitioner addressed the EEO Complaint[s] at that hearing. On February 3,1994, the Magistrate recommended that Respondent's Motion For Summary Judgment be

granted, based on the untimely filed MSPB Appeal in the district court pursuant to 5 USC § 7703(b)(2). And that Petitioner's entire Complaint be dismissed without mention of the EEO Complaint[s]. Petitioner timely motioned the court to review the Magistrate's Recommendation. (Appendix E.) On March 29, 1994, the district court denied Petitioner's Motion To Review and ordered Summary Judgment. (Appendix D.) On April 5, 1994, Petitioner motioned the district court to Vacate Void Judgment pursuant to Fed. R. Civ. P. 60(b).

Rule 60(b)(3) permits relief from a court order based on the intrinsic or extrinsic fraud of an adverse party. Rule 60(b)(4) permits relief if the judgment is void. In three (3) separate pleadings, June 1, 1994, June 28, 1994, and October 11, 1994, Petitioner noticed the district court that the Agency's assault charge was fraudulent from it's inception and that the EEO Complaint[s] was actionable, independent of 5 USC § 7703(b)(2). On October 11, 1994, Petitioner asserted that the court's March 29, 1994 Order and Opinion, was void without findings of fact and conclusions of law on the EEO Complaint[s], pursuant to Fed. R. Civ. P. 52(a). On October 18, 1994, the court denied Petitioner's Motion To Vacate Void Judgment, without addressing the issues of fraud or subject matter jurisdiction based on the EEO Complaint[s], pursuant to 42 USC § 2000e-et seq.

The case went to the court of appeals. Andress v. Runyon, 94-3474 (6th Cir. April 12, 1995). (Appendix B.) Petitioner argued that the district court had subject matter jurisdiction to collaterally review de novo the June 14, 1991 Agency action, based on the unanswered, unmixed EEO Complaint[s]. The counsel for Respondent submitted erroneous information to the court of appeals, suggesting that race discrimination was litigated by the MSPB, without offer of proof, contradicting Petitioner's true representation that it was not. Oral argument was requested by Petitioner but denied. The court did not address the EEO Complaint[s].

On April 21, 1995, Petitioner suggested a Rehearing En Banc pursuant to Fed. R. App. P. 35 and local rule 6th Cir. R. 14 for the purpose of appealing the April 12, 1995 Order. Petitioner presented four (4) questions to the court, to wit:

1. Did the counsel for Defendant-Appellee submit false information to [the court of appeals?
2. Did [that] court rely on that false information to the prejudice and harm of Plaintiff-Appellant in the formulation of it's Opinion and Order? (Appendix B)
3. Did the Sixth Circuit treat Plaintiff-Appellant's EEO Complaint (P 742 552 303) less favorably than the Fourth Circuits treatment of a very similarly situated Appellant in Rosenfeld v. Department of the Army, 769 F.2d 237 (1985)?

4. Is there a due process requirement guaranteed by the Fifth Amendment connecting the EEO Complaint to eligibility for judicial of its merits?

On June 2, 1995, the court of appeals dismissed the Suggestion without answering the questions. (Appendix A.)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. INTRODUCTION

This case revolves around an issue of due process, i.e., de novo review of a suspect discriminatory Agency action in federal employment pursuant to 42 USC § 2000e - 16(c). That issue has been ruled on in the Supreme Court. Chandler v. Roudebush, 425 U.S. 840,842,845 (1976). The Sixth Circuit's treatment of Petitioner's EEO Complaint[s] was far less favorable than the Fourth Circuit's treatment of an EEO complaint from a nearly identically situated plaintiff-appellant, relying on Chandler, supra, for its *ratio decidendi*. Rosenfeld v. Department of the Army, 769 F.2d 237 (4th Cir. 1985).

Both the instant case and Rosenfeld, supra, involved subject matter jurisdiction for collateral judicial review of employment termination under Title VII, based on subsequent EEO discrimination claims that were never litigated by a prior proceeding under 5 USC Government Organization and Employees.

The courts below, with respect to the EEO Complaint[s], had to determine:

1. Whether or not they were mixed with the MSPB Appeal under 5 USC § 7702(a)(2)?
2. Whether or not administrative res judicata estopped it?

The only discrimination matters litigated by the MSPB under 5 USC § 7702 (a) (2) were:

> [Whether] . . . "the agency's action discriminated him (Petitioner) because of a handicapping condition (service-connected stress disorder)" (Appendix G , MSPB initial decision at p. 8.) and;
> [Whether] . . . "the agency's removal action in this case was in reprisal for an EEO Complaint he filed on or about April 30, 1991." (Appendix G, MSPB initial decision at p. 9.)

They were the only discrimination matters subject to or conditioned by 5 USC § 7703(b)(2).

Leonard Adams' January 2, 1991 Disciplinary Request to remove Petitioner without cause and his perceived challenge to fight Petitioner on April 29, 1991, were not discrimination matters litigated by the MSPB. The latent race discrimination revealed on September 30, 1991, performed in support of an over-arching continuing violation of anti-discrimination laws, undoubtedly were not matters litigated at the August 23, 1991 MSPB Hearing. In fact the full EEO discrimination violation did not bloom until September 30, 1991.

The theory of a continuing violation was evidenced in the October 29, 1991 EEO Complaint[s] and the charge of "race discrimination" was clearly alleged against the deciding official William "(Bill) Thompson", based on Judge Donnellon's September 30, 1991 Statement of Fact. EEO Agent Darrell Brown undoubtedly received the EEO Complaint[s] by Certified Mail, evidenced by his signature on the Mail Receipt. (Appendix I.) The EEO Complaint[s] was exclusively governed by 42 USC § 2000e-16(c) and 29 CFR § 1613.641 (a)(2).

Assuming that the Fourth Circuit was correct:

> The holding in Chandler, permitting relitigation of the factual question of discrimination in federal court not withstanding prior rejection of the identical claim by the Civil Service Commission necessarily repudiates any res judicata or collateral estoppel effect for administrative findings. Rosenfeld, supra at p. 240.

neither the MSPB Appeal, nor the subsequent related court proceedings dismissed without prejudice to the merits, had a preclusive effect on the EEO Complaint[s]. The Respondent Postmaster General is bound by the willful failure of his EEO Agent, to process and answer the Complaint[s] in good faith after October 29, 1991. Irwin v. Dep't. of Veterans Affairs, 498 U.S. 90, 93 (1990).

BECAUSE the jurisdiction invoked by the October 29, 1991 EEO Complaint[s] was: 1) not mixed with the MSPB Appeal and; 2) not estopped by it's findings; pursuant to 42 USC § 2000e-16(c), the district court had collateral subject matter jurisdiction to review the June 14, 1991 Agency action terminating Petitioner's affirmative action employment.

B. SPECIFIC DISCRIMINATION VIOLATION[S]

The only factual question of discrimination in need of reconsideration for determination of all the discrimination violations evidenced in the EEO Complaint[s] is: who assaulted whom? between Worsham and Petitioner at 11:30 P.M. on May 14, 1991. The lower courts have declined to exercise their jurisdiction over the EEO Complaint[s] for an indigent non-member of their Bar. There is substantial, if not preponderant evidence and specific precedent legal authority, to conclude that as a matter of fact and law-Ohio R.C. § 2903.13, Worsham actually assaulted Petitioner with the forklift he was operating.

That question was the first (1st) cause of action to the district court on March 31, 1993. (Complaint: at p. 4.) And the last issue addressed to the court of appeals on April 21, 1995. (Suggestion: at p. 5.) Pursuant to Rosenfeld, supra,

it was not estopped by the MSPB finding on the assault charge, which was politically correct but judicially flawed.

On May 14, 1991, Worsham officially accused Petitioner of assault, to his supervisor, without disclosing his hostile personal contact before 11:30 P.M. Gurley's sworn testimony established Worsham's hostile state of mind toward Petitioner at 10:45 P.M., forty-five (45) minutes before the fight and diminished the accuser's credibility as a truthful witness. Worsham's own sworn testimony: "I'm not certain I didn't hit him"; affirmed Petitioner's allegation that Worsham did in fact hit him with the forklift at 11:30 P.M.

Johnson v. Hardnett, Ohio App 405 N.E. 2d 324 (1978), addressed the question of motor vehicle operators intimidating pedestrians by low speed contact with hostile intent and determined that such contact was expressly prohibited by public law necessary for maintenance of the peace, and therefore assault pursuant to Ohio R.C. § 2903.13.

Worsham's breaching of the peace with Petitioner was the flash point of the May 14, 1991 fight. Petitioner was punished to the maximum extent for fighting with Worsham. Worsham was not punished at all for assaulting Petitioner.

[1] The June 14, 1991 Agency action singularly terminating white Petitioner's employment for fighting with a co-belligerent black employee, Charles Worsham, on May 14, 1991, was racially discriminatory and violative of 42 USC § 2000e-2(a). Mc Donald v. Santa Fe Trail Transportation Co. 427 U.S. 273 (1976).

The discriminatory nature of Petitioner's employment termination, eliminated any possible just cause for the Agency action. One (1) termination without cause after EEO activity could be attributed to a mistake. Two (2) terminations without cause after EEO activity, within a twenty-eight (28) month period, evidence a cause and effect relationship. In light of the first Complaint: Andress v. Frank, C-1-89-511 (S.D. Ohio December 12, 1990), for handicap, reprisal and race discrimination; the Complaint styled as Andress v. Runyon, C-1-93-207 (S.D. Ohio 1994) represents a continuation of the prior violation, resuming January 2, 1991, three (3) weeks after settlement of Andress v. Frank, supra.

[2] The June 14, 1991 Agency action terminating Petitioner's employment for the second time without cause was the product of a continuing violation of anti-discrimination laws: 29 USC § 794 (a) and 42 USC § 2000e-et seq. Haithcock v. Frank, 958 F.2d 671 (6th Cir. 1992).

As a matter of law, Petitioner was immune to any false accusation of assault. Immediately after the fight, in which he was a co-belligerent, Worsham

threatened retaliation: "I'll get you"; corroborated under oath by Dennis Gurley. Worsham's official May 14, 1991 Statement, accusing Petitioner of assault, realized that threat. The statement was half true because Petitioner did strike Worsham during the course of the short fight, but essentially false without mention of Worsham's provocative misconduct with a motor vehicle between 10:30 P.M. and 11:30 P.M. on that day.

Worsham's untrue official Statement, submitted to his supervisor was:

1) subject to 18 USC § 1001;
2) instantly corrupting the due process function of the Agency entrusted by law to it;
3) knowingly made with reckless disregard of the whole truth;
4) material and intended to induce Agency reliance for the disciplinary action;
5) an unreliable basis for the Agency action.

United States v. Estus, 544 F. 2d 934 (8th Cir. 1976); United States v. Evans, 559 F. 2d 244 (5th Cir. 1977); United States v. Bedore, 455 F. 2d 1109 (9th Cir. 1972); United States v. Goldfine, 538 F. 2d 815 (9th Cir. 1976); United States v. Myers, 131 F. Supp 525 (D.C. Cal 1955).

Thompson recorded his intention to remove Petitioner without cause on February 14, 1989. Adams recorded his intention to remove Petitioner without cause on January 2, 1991. Worsham's false

accusation suited their predetermined purpose perfectly. An objective, complete and thorough investigation would have discovered that the preliminary material witness statements from Gurley, Grosser and Powell were nothing more than their presumptive conclusions based on what they heard, without visual confirmation. The entire controversy boiled down to Petitioner's word against Worsham's plus three (3) presumptive conclusions. All three (3) material witnesses to the May 14, 1991 fight, repudiated their preliminary statements under oath. (ante, at p.9.)

On June 14, 1991, Thompson's-Notice of Removal and Adams' May 24, 1991 Notice of Proposed Removal, implicitly and explicitly affirmed Worsham's untrue May 14, 1991 Statement accusing Petitioner of assault, without regard or knowledge of it's truth or rather lack thereof. The cause they stated for termination of Petitioner's employment was false. A statement recklessly made without knowledge of it's truth, but which in reality is false, is a false statement knowingly made within the settled rule. Cooper v. Schlesinger, 111 U.S. 148 (1884). 37 Am Jur 2d § 203 FRAUD AND DECEIT.

These three (3) fraudulent official writings violative of 18 USC § 1001 from the accuser, proposing and deciding Agency officials, were the

keys to a punitive disciplinary scheme, enabling Adams and Thompson to terminate Petitioner's employment on June 14, 1991, with colorable cause. In the Sixth Judicial Circuit, conspiracy criteria are:

1) an unlawful object to be accomplished;
2) a plan or scheme embodying the means to accomplish the object;
3) an agreement or understanding between two or more whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement or by any effectual means.

United States v. Bostic, 480 F.2d 965 (6th Cir. 1973). 15 A, C.J.S. CONSPIRACY § 1 et seq. Termination of Petitioner's employment without cause was the unlawful object. Punitive disciplinary action was the scheme. On June 14, 1991, all three (3) key people in the discipline scheme were in agreement and committed to termination of Petitioner's employment evidenced by their signatures on the prerequisite official writings. They discriminated against Petitioner with unity of purpose (Petitioner's removal) and concerted ill will (retaliation).

EEO activity in federal employment is protected by statute-42 USC § 2000e-3(a), and the First Amendment. Termination of employment without cause under circumstances that infer retaliation for EEO activity and subsequent court

action, violates the First Amendment. Arnett v. Kennedy, 416 U.S. 134, 161 (1974).

Termination of a non probationary federal employee without cause on a false charge, violates property and liberty interests, protected by the Fifth Amendment. Arnett, supra, 416 U.S. 134,151,152,157, 158.

The basic theme of equal protection is implicit in "cruel and unusual punishment". A penalty should be considered unusually imposed if it is administered arbitrarily or discriminatorily; and violative of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238, 249 (1972).

[3] On June 14, 1991, the Agency's continuing discrimination violation for the purpose of terminating Petitioner's employment formed a conspiracy in fraud violative of: 18 USC § 1001; the First; Fifth; and Eighth Amendments to the Constitution.

On August 23, 1991, Worsham testified under oath that he was cognizant of the fact that the state criminal prosecution of Petitioner was going to be dismissed by the Hamilton County municipal court on September 18, 1991. For undisclosed reasons it was not. On September 30, 1991, Judge Donnellon emphatically stated the outrageous interference of the "board down in the post office". They were manipulating a reversed form of racial bias to exploit the May 14, 1991 fight, as: "a black and white

incident"; to tip the scales of justice against Petitioner, expropriating the remaining presumption of innocence. The entire Agency action rested upon the May 14, 1991 Accusation of assault. The Hamilton County municipal court had competent and concurrent jurisdiction to speak on this matter and it's ramifications.

On September 30, 1991, the Hamilton County municipal court, recorded a prima facie violation of Petitioner's Sixth Amendment right to a fair criminal trial. Ohio v. Andress, 91-CRB-18768. Respondent can not rebut Judge Donnellon's Statement of Fact, evidencing the covert interjection of racial bias into that judicial process by Agency officials, who had related business with Petitioner in the Post Office. (ante at p.11.) Judge Donnellon did not know Thompson and Adams by name but succinctly registered their intention to prejudice the trial's outcome. The Fourteenth Amendment guarantees:

> "the equal protection of the laws";

to any defendant regardless of race in a state criminal prosecution. In McDonald, supra 427 U.S. 273, 288, Mr. Justice Marshall noted that the enforcement section of the Thirteenth Amendment:

> "prohibited any racial discrimination . . . against whites".

The conspiracy to provide colorable cause for terminating Petitioner's employment was motivated by class (handicap, race) based discriminatory animus of a retaliatory nature. The "board down in the post office" interfered with the duly constituted judicial authority of the state of Ohio, in it's prosecution of Petitioner, on the same charge that Thompson and Adams used to terminate Petitioner's employment. They wanted a determination of the May 14, 1991 assault charge in the state court, to be concurrent with and supportive of their administrative action. They expropriated Petitioner's immunity from false prosecution to achieve that result. Petitioner's essential livelihood was a meritorious privilege authorized by Congress. The conspirators were all bound by the Code of Ethics for all federal employees, requiring them to uphold the Constitution and other Laws of the Land. The actions of the Agency officials and the accuser were violative of 42 USC § 1985 (3). Griffen v. Breckenridge, 403 U.S. 88, 92-95, 97 (1971).

[4] The June 14, 1991 conspiracy included a malicious state criminal prosecution on September 30, 1991-Ohio v. Andress, 91-CRB-18768-based on Worsham's May 14, 1991 assault Accusation, violative of: 42 USC § 1985(3) the Sixth; Thirteenth; and Fourteenth Amendments to the Constitution.

CONCLUSION

WHEREFORE, Petitioner submits four (4) propositions of law in support of this Petition for a writ of certiorari, to wit:

1. That the federal district court abused its discretion in the October 18, 1994 Order, by ruling against Petitioner's April 5, 1994 Fed. R. Civ. P. 60(b) Motion to set aside the court's March 29, 1994 Order, dismissing Petitioner's entire Complaint (C-1-93-207) without hearing or addressing his October 11, 1994 Motion, summarizing the reasons: Rule 60(b)(3) - fraud; and Rule 60 (b)(4) - void judgment; why the EEO Complaint[s] qualified for judicial review independent of 5 USC § 7703(b)(2). Harris v. Callwood, 894 F.2d 1254, 1255,1256 (6th Cir. 1988).

2. That the district court usurped judicial power in the October 18, 1994 Order, when it affirmed a Fed. R. Civ. P. 56 Summary Judgment in favor of Respondent pursuant to 5 USC § 7703(b)(2) on the EEO Complaint[s], presenting timely charges and evidences of race discrimination and a continuing violation to the Respondent, that were never heard by the MSPB; denying Petitioner's due process right to be heard on the EEO Complaint[s], without giving a conclusion of law pursuant to Fed. R. Civ. P. 52 (a), as to why it was not actionable in the district court after one hundred-eighty (180) days

without final action taken by Respondent, pursuant to 42 USC § 2000e-16(c). Chandler; Rosenfeld, supra; United States v. Boch Oldsmobile Inc., 909 F.2d 657, 661 (1st Cir. 1990).

3. That the court of appeals failed to correct the prejudicial errors below and abused it's own discretion in the April 12, 1995 Order, by ruling on Petitioner's Appeal without the oral argument requested and without addressing the issue he presented to the court on November 21, 1994, to wit:

> Whether the adverse Agency administrative action terminating Appellant's employment was collaterally reviewable de novo based on timely but unanswered EEO Complaints (P 742 552 303; P 290 930 804) pursuant to 29 USC § 794(a) and 42 USC § 2000e-et seq. which provided subject matter jurisdictional grounds. . . independent of and not mixed with 5 USC § 7703(b)(2). (Appellant's Brief at p.2.)

and affirming the district court's Fed. R. Civ. P. 56 Summary Judgment in favor of Respondent when there remained a genuinely disputed issue of material fact: who assaulted whom? and the EEO Complaint[s], that Respondent received but has never denied at the administrative level which, until proven otherwise, qualified for judicial review as a matter of law - 42 USC § 2000e-16(c), pursuant to Chandler, and Rosenfeld, supra. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

BEST AVAILA

4. That the court of appeals' June 2, 1995 Order, denying a rehearing and consequently judicial review of the EEO Complaint[s], without answering questions about how the EEO Complaint[s] related to their judicial process, was contrary to the intent of Congress with respect to judicial review of final agency actions in general and in particular to that legislative intent expressed at 42 USC § 2000e-11, as it related to the June 14, 1991 Agency action against Petitioner, terminating a disabled Veteran's preferential employment without cause. Abbott Laboratories v. Gardner, 387 U.S. 136, 140,141 (1967); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 261& nn. 6-7 (1979).

The lower courts in the Sixth Circuit have made serious errors in judgment on the October 29, 1991

EEO Complaint[s], regarding due process and jurisdiction, which have caused conflict between decisions of the Supreme Court and the Judicial Circuits. Moreover the conflict is of sufficient gravity and general importance to warrant review by the Supreme Court.

THEREFORE, certiorari should be granted!

Respectfully submitted,

Edward J. Andress, Citizen pro se.

BLE COPY

AFFIDAVIT OF VERIFICATION

STATE OF OHIO)
) SS
COUNTY OF HAMILTON)

Petitioner, Edward J. Andress, being first duly sworn upon his affirmation, deposes and says that the above Petition For Writ Of Certiorari is a true and correct relation of the facts based on my first hand personal knowledge as a witness to:

1) The May 14, 1991 fight between Petitioner and Charles Worsham, at the Annex, 1623 Dalton Street, Cincinnati, Ohio;

2) The August 23, 1991 MSPB Hearing where Petitioner heard all the other witnesses give their sworn testimony about the matter in controversy;

3) The September 30, 1991 criminal prosecution of Petitioner in the Hamilton County municipal court, Ohio v. Andress, 91-CRB-18768.

Respectfully submitted,

Edward J. Andress,
1827 Walker Street
Cincinnati, Ohio

Subscribed and sworn to before me, a Notary Public on this 4th day of July, 1995.

NOTARIAL SEAL
STATE OF OHIO

Notary Public
My Comm. Expires Dec. 30, 1997

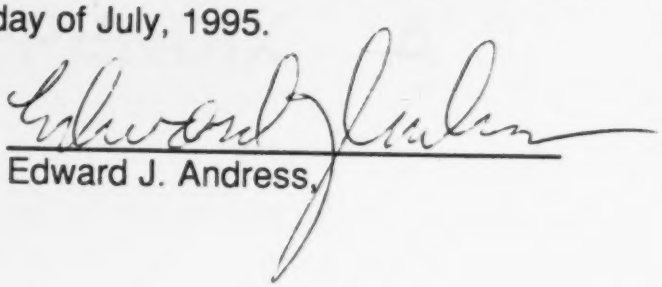
CERTIFICATE OF SERVICE

I, Edward J. Andress, hereby certify that I have mailed, by First Class U.S. Mail postage prepaid, a true copy of the foregoing Petition For Certiorari to:

Drew S. Day, III
Solicitor General
Department of Justice
10th & Constitution Ave.
Washington, DC 20530

Brian M. Reimer
Attorney/Appellate Div.
U. S. Postal Service
475 L'Enfant Plaza S.W.
Washington, DC 20260

and the original plus thirty-nine (39) copies to the Supreme Court of the United States, Office of the Clerk, One First Street, N.E., Washington, DC, 20543, this 7th day of July, 1995.



Edward J. Andress